IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANDREW JAMES DAVID, Appellant	No. 33403-8-II OPINION PUBLISHED IN PART

Hunt, J. — Andrew David appeals his conviction and sentence for vehicular homicide, resulting from his speeding vehicle's collision with another vehicle while driving with his blood alcohol level at twice the legal limit. He argues that (1) the vehicular homicide statute violates the separation of powers doctrine, (2) the trial court abused its discretion when it (a) admitted into evidence a photograph of the victim when she was alive and unharmed and (b) refused to admit into evidence the victim's toxicology report, (3) the trial court failed to instruct the jury on how to determine whether a blood test is valid, (4) the prosecutor committed misconduct during closing argument, and (5) his exceptional sentence violated *Blakely*.[1]

In his Statement of Additional Grounds for Review,[2] David also argues that his trial counsel rendered ineffective assistance, his conviction violated the constitutional prohibition of ex post facto laws, and he was denied his right to a speedy trial. We affirm.

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[1] *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

[2] RAP 10.10.

FACTS

I. Vehicular Homicide

One late summer afternoon, Lorna Kuhlman was driving east on Highway 101 near her home in Sequim. Along the same stretch of highway, intoxicated Andrew David was driving west 25 m.p.h. or so above the posted 45 m.p.h. speed limit. Kuhlman entered the left-turn lane at the highway's intersection near the Dungeness River Bridge. As she began turning left, across the westbound lanes of Highway 101, David crashed into the passenger side of her car, killing her and injuring and rendering himself unconscious.

A witness who came to David's assistance smelled alcohol on his breath. State Trooper Richard Ward also smelled a strong odor of alcohol coming from David's vehicle and body. An aid crew rushed David to the hospital.

After David regained consciousness, Ward read him his *Miranda*[3] rights, which David waived. Ward arrested David for vehicular homicide, read him a "special evidence warning,"[4] and, with the assistance of medical personnel, drew David's blood to test his blood-alcohol content. The resulting toxicology report revealed that, at the time of the crash, David had a blood alcohol level of .16 grams per hundred milliliters.

Six days later, a Washington State toxicologist tested Kuhlman's blood during her autopsy. These blood tests revealed a blood-alcohol content of .02 grams per hundred milliliters,

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[4] This "special evidence warning" explains to arrestees for alcohol-related crimes their legal rights concerning blood-alcohol-level tests.

possibly attributable to post-mortem decomposition, and the presence of the following medications: carisoprodol, hydrocodone, meprobamate, paroxetine, diphenhydramine, acetaminophen, and chlorpheniramine.[5]

II. Procedure

The State charged David with vehicular homicide, alleging two theories—that David drove recklessly and that he drove while under the influence of alcohol. The second theory also supported enhancement of David's sentence based on his four prior driving under the influence (DUI) convictions.

A. Proposed Bifurcation for Sentencing

David asked the court to bifurcate his jury trial and sentencing proceedings if the State planned to seek an enhanced sentence based on his prior DUI convictions. The trial court denied this request, reasoning that it could impose the sentencing enhancement based on David's prior convictions without a jury finding on this issue.

B. Evidentiary Rulings

1. Victim's toxicology report

At trial, David offered into evidence Kuhlman's Washington State Patrol "Death Investigation Toxicology Report" to prove his theory that Kuhlman drove at a "snail's pace" of five m.p.h. across the intersection because she was intoxicated, thereby contributing to the accident. In his offer of proof, David presented Kuhlman's autopsy toxicology report, which

[5] David does not contend that these substances were illegal drugs. On the contrary, the record indicates that Kuhlman obtained these medications either by prescription or over the counter.

listed five medications in her system and a low blood-alcohol level, potentially attributable to post-mortem decomposition. David then read from the Physician's Desk Reference and on-line information about the side-effects of the medications in Kuhlman's system, asserting that they cause drowsiness and dizziness and carry warnings to use caution while driving. David did not include in his offer of proof any expert testimony to explain how the presence of these medications in Kuhlman's blood might have affected her driving.[6]

David argued that the toxicology report showed that (1) Kuhlman was the sole proximate cause of the crash because she was intoxicated and violated his right of way; or (2) he was not reckless because a reasonable person could not have foreseen that a person would drive as slowly as Kuhlman did when she crossed the intersection. Without commenting on the sufficiency of David's offer of proof, the trial court excluded the toxicology report as irrelevant. It reasoned that "all of the tests [for] superseding cause are from the standpoint of the defendant - what would the defendant have reasonably anticipated - and the reasons why an individual might have violated the rules of the road in any respect are relatively unimportant." Report of Proceedings (RP) 4/11/05 at 107-08.

The trial court did allow David (1) to present evidence of the manner in which Kuhlman had driven, (2) to present evidence that she had violated the rules of the road, and (3) to argue that he was not the proximate cause of Kuhlman's death. Jeffery Taylor, an accident witness, testified that Kuhlman's car "was coming at a slow rate of speed, just creeping out there," and

[6] David told the court that he would later provide an expert to present this information, but he never did so.

that her car "just slowly came across" the intersection.

2. "In-life" photograph of victim

The State offered into evidence an "in-life"[7] photograph of Kuhlman. David objected. The State argued that the photograph was relevant because "the State does indeed have a right to present this was the person who was killed. It's a real life human being." RP 4/11/05 at 80. Cautioning the State to discuss the photograph only briefly and to avoid a plea to the jury's passion or prejudice, the trial court admitted the photograph into evidence.

C. Jury Instructions

David requested an instruction defining the methods the jury should use to determine whether the blood tests were accurate.[8] Ruling that David's proposed instruction related "more to the admissibility of the evidence rather than the weight," the trial court declined to give it. RP 4/14/05 at 11-12.

Without objection, the trial court instructed the jury on (1) a driver's general duty to use ordinary care while on a public highway; (2) the special duty required of a driver turning left at an intersection; (3) proximate causation; and (4) a "superseding intervening cause," to which David objected.

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[7] "In-life" describes a photograph taken while Kuhlman was alive, distinguished from a post-mortem photograph

[8] David proposed the following instruction:

> To be considered valid an analysis of a person's blood must have been performed according to methods approved by the state toxicologist.
>
> In evaluating any evidence of blood testing, you shall take into account the manner in which any test was conducted, including the handling of any samples prior to testing as well as whether there was compliance with the procedures set by the state toxicologist.

Supp. Clerk's Papers (CP) at 45.

D. Closing Arguments

During closing argument, David argued to the jury, "If [the prosecutor in closing arguments] brings up stuff that was not talked about you have to think of what her motives are." RP 4/14/05 at 43-44. The trial court overruled the State's objection. RP 4/14/05 at 43-44.

In rebuttal, the prosecuting attorney argued, "[M]y motive is to [e]nsure that justice is done. I don't have any other [u]lterior motive." "I submit the true theory of the case, it's exactly what happened." RP 4/14/05 at 65. David did not object.

E. Verdict

The trial court gave the jury an interrogatory, special-verdict form that asked, "Has the jury found unanimously that at the time of causing the injury, the defendant was operating the motor vehicle (a) [w]hile under the influence of intoxicating liquor? . . . [or] (b) in a reckless manner?" Supp. Clerk's Papers (CP) at 23. The jury answered, "Yes," to both questions. The jury also found David guilty of vehicular homicide.

F. Sentence

At sentencing, the trial court determined that (1) David had an offender score of zero, (2) David had four prior DUI convictions, and (3) his unenhanced standard-range sentence for vehicular homicide was 31 to 41 months. But David's four prior DUI convictions increased his standard-sentencing range by 96 months. The trial court sentenced David to 132.5 months

confinement, sentencing him in the middle of the standard sentencing range.[9]

David appeals.

ANALYSIS

I. Separation of Powers

David's argument presents an issue of first impression. He first argues that the vehicular homicide statute, RCW 46.61.520, violates the separation of powers doctrine because the statute (1) fails to define the essential elements of the offense, specifically, proximate causation; and (2) thus, requires the courts to supply missing definitions, which is an improper delegation of legislative authority to the judiciary. We disagree.

A fundamental principle of our American constitutional system is that governmental powers are divided among three separate and independent branches—legislative, executive, and judicial. *State v. Osloond*, 60 Wn. App. 584, 587, 805 P.2d 263, *review denied*, 116 Wn.2d 1030 (1991). Our Washington state constitution does not contain a formal separation-of-powers clause. Nonetheless, separation of powers is a vital doctrine, presumed throughout our state history from the division of our state government into three separate branches. *Carrick v. Locke*, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994).

The separation-of-powers doctrine serves mainly to ensure that fundamental functions of each branch of government remain inviolate. *Carrick*, 125 Wn.2d at 135. This doctrine is

[9] The State originally erred in calculating David's standard sentencing range, using an offender score of one, resulting in a standard range of 36-48 months. David's offender score should have been zero, which would have resulted in a standard range of 31-41 months. When David raised this issue at the sentencing hearing, the trial court modified its original sentence to 36.5 months with a 96-month enhancement for his four prior DUI convictions. David does not appeal the calculation of his sentencing range.

violated when "the activity of one branch threatens the independence or integrity or invades the prerogatives of another." *State v. Moreno*, 147 Wn.2d 500, 505-06, 58 P.3d 265 (2002) (quoting *Carrick*, 125 Wn.2d at 135).

There are several categories of separation-of-powers violations, two of which are relevant here. A statute potentially violates the separation-of-powers doctrine if it (1) allows the judiciary to encroach on legislative functions, *State v. Wadsworth*, 139 Wn.2d 724, 734, 991 P.2d 80 (2000), or (2) improperly delegates core legislative functions to the judiciary. *Sackett v. Santilli*, 146 Wn.2d 498, 504-05, 47 P.3d 948 (2002).

At the same time, however, the separation-of-powers doctrine is grounded in flexibility and practicality; rarely does it offer a definitive boundary beyond which one branch may not tread. *Carrick*, 125 Wn.2d at 135. Thus, the separation of powers doctrine does not mandate that the three branches of government seal off hermetically from one another. *Carrick*, 125 Wn.2d at 135. Rather, the different branches remain partially intertwined to maintain an effective system of checks and balances, as well as an effective government. *Carrick*, 125 Wn.2d at 135.

In analyzing a possible separation-of-powers violation, it is helpful to examine both the history of the challenged practice and the challenged branch's tolerance of analogous practices. *Carrick*, 125 Wn.2d at 136. Although deeply embedded traditional ways of governing cannot supplant the Constitution or legislation, tradition does give meaning to the words of the Constitution and statutes. *Carrick*, 125 Wn.2d at 136. Thus, a long history of cooperation between or among governmental branches in any given instance tends to militate against finding a separation-of-powers violation. *Carrick*, 125 Wn.2d at 136.

A. Standard of Review

We assume that the Legislature considers the constitutionality of its enactments; thus, the Legislature is entitled to some deference. *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998). Because courts presume that a statute is constitutional, the burden is on the challenging party to prove beyond a reasonable doubt that it is unconstitutional. *State ex rel. Peninsula Neighborhood Ass'n v. Dep't of Transp.*, 142 Wn.2d 328, 335, 12 P.3d 134 (2000). Thus, it is for the judiciary ultimately to decide whether the Legislature had the constitutional power to enact a given statute and whether the statute violates a constitutional mandate. *Peninsula Neighborhood Ass'n*, 142 Wn.2d at 335.

B. Vehicular Homicide Statute and Common Law Definition of Proximate Cause

Under RCW 46.61.520(1), a driver is guilty of vehicular homicide while operating a motor vehicle (1) "[w]hen the death of any person ensues within three years as a proximate result of injury *proximately caused* by the driving of any vehicle by any person" and (2) when the driver was under the influence of an intoxicant, was reckless, or disregarded the safety of others. (Emphasis added.) Although the Legislature did not define "proximate causation,"[10] it did enact a saving clause, mandating that "[t]he provisions of the common law relating to the commission of crime and the punishment thereof, insofar as not inconsistent with the Constitution and statutes of this state, shall supplement all penal statutes of this state . . . ." RCW 9A.04.060 (Laws of 1975, 1st Ex. Sess., ch. 260).

[10] At least three other statutes also refer to "proximate causation": RCW 62A.4-402 Wrongful Dishonor, RCW 70.122.080 Withdrawal of Life Sustaining Procedures, and RCW 7.72.030 Products Liability. As with RCW 46.61.520(1), the Legislature did not define "proximate causation" in these other statutes.

1. No judicial encroachment on legislative powers

David first argues that (a) defining an essential element of a criminal statute is properly a legislative function and, therefore, (b) incorporating the common law definition of "proximate causation" into the vehicular homicide statute is an improper judicial encroachment on legislative powers. This argument fails.

David incorrectly interprets our Supreme Court's pronouncement that "[i]t is the function of the legislature to define the elements of a crime." Br. of Appellant at 17 (citing *Wadsworth*, 139 Wn.2d at 734). David takes this quotation out of context, contending that it means the Legislature must provide a statutory definition for every element of every crime. Such is not the law.

When our Supreme Court ruled that the Legislature defines the elements of a crime, it meant that the Legislature must set out in the statute the essential elements of a crime. *See Wadsworth*, 139 Wn.2d at 734. For example, the Legislature must determine whether a particular mental state is an essential element of a crime. *State v. Bash*, 130 Wn.2d 594, 604, 925 P.2d 978 (1996).

It has never been the law in Washington that courts cannot provide definitions for criminal elements that the Legislature has listed but has not specifically defined. Nor has this practice generally been viewed as a judicial encroachment on legislative powers.[11] On the contrary, the judiciary would be acting contrary to the Legislature's legitimate, express expectations, as well as

[11] Furthermore, in those instances where the court has misperceived the Legislature's intent or expectations, the Legislature systematically enacts corrective statutes, sometimes expressly noting a specific judicial opinion that it intends a particular statute to supercede.

failing to fulfill judicial duties, if the courts did not employ long-standing common-law definitions to fill in legislative blanks in statutory crimes. The Legislature is presumed to know this long-standing common law. *State v. Carlson*, 65 Wn. App. 153, 158, 828 P.2d 30, *review denied*, 119 Wn.2d 1022 (1992).

By enacting RCW 9A.04.060 in 1975, the Legislature indicated its intent "to continue the then-existing" practice of judicially defining "proximate causation." *See State v. Smith*, 72 Wn. App. 237, 241, 864 P.2d 406 (1993) (holding that RCW 9A.04.060 expresses the Legislature's intent to continue the common law rule of "legal efficacy,"[12] in effect in 1975).[13] Therefore, in omitting a statutory definition of "proximate causation" when it promulgated RCW 46.61.520 (establishing the crime and elements of vehicular homicide) in 1975, the Legislature implied that the judiciary should continue to define "proximate causation" according to common law principles, just as the judiciary had done before 1975, when the Legislature enacted the saving clause. *See* RCW 9A.04.060. In this way, the courts follow, rather than subvert, the Legislature's mandate.

2. No improper legislative delegation to judiciary

David similarly argues that the Legislature cannot delegate to the judiciary its power to define essential elements of a crime. This argument similarly fails.

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[12] "[U]nder RCW 9A.04.060 the rule of legal efficacy is a 'provision of the common law' that 'shall supplement all penal statutes of this state'." *Smith*, 72 Wn. App. at 241.

[13] Before 1975, our Supreme Court ruled on the common law meaning of "proximate causation" in the context of the vehicular homicide statute. *State v. Jacobsen*, 74 Wn.2d 36, 37-8, 442 P.2d 629 (1968).

We agree with David that the Legislature may not delegate its *purely* legislative functions. *Diversified Inv. P'ship v. Dep't of Soc. & Health Servs.*, 113 Wn.2d 19, 24, 775 P.2d 947 (1989). But he fails to show that defining an essential element of a crime is a purely legislative function.[14] On the contrary, as we note above, the Legislature has historically left to the judiciary the task of defining some criminal elements, an arena in which the Legislature has no "definitive boundary beyond which [the courts] may not tread." *Carrick*, 125 Wn.2d at 135. *See Wadsworth*, 139 Wn.2d at 736-37 (discussing legislative delegation that does not violate the separation of powers doctrine).

Accordingly, we hold that RCW 46.61.520 is not an unconstitutional violation of the separation of powers doctrine.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

II. Evidentiary Rulings

Evidence Rule (ER) 401 defines "relevant" evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Relevant evidence is admissible; irrelevant evidence is inadmissible. ER 402.

The threshold to admit relevant evidence is very low and even minimally relevant evidence

[14] To support this proposition, David points only to his interpretation of *Wadsworth*, incorrectly asserting that the Legislature must write a definition for each criminal element. Br. Of Appellant at 17 (citing *Wadsworth*, 139 Wn.2d at 734).

is presumptively admissible. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Nonetheless, the trial court has broad discretion in determining the relevance and, therefore, the admissibility, of evidence. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991).

A. Victim's "In-Life" Photograph

David next argues that we should reverse his conviction because the trial court erred in admitting into evidence an "in-life" photograph of Kuhlman. We disagree.

1. Standard of review

A ruling regarding the admissibility of photographs is generally within the trial court's sound discretion, which we will not disturb absent a showing of abuse of discretion. *State v. Crenshaw*, 98 Wn.2d 789, 806, 659 P.2d 488 (1983). "Abuse of discretion" means that a trial court's decision was manifestly unreasonable or based on untenable grounds or reasons. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

Because the State did not have to prove Kuhlman's identity, her photograph had little bearing on the case. *See* RCW 46.61.520. But David fails to articulate how the trial court's decision was "manifestly unreasonable or based upon untenable grounds or reasons." *Stenson*, 132 Wn.2d at 701.

2. Harmless error

But even assuming, without deciding that the photo was irrelevant, David's challenge to its admission fails because he has not demonstrated that the error prejudiced him.

An erroneous evidentiary ruling is not grounds for reversal unless, within reasonable

probabilities, it materially affected the trial's outcome. *State v. Nelson*, 131 Wn. App. 108, 117, 125 P.3d 1008 (2006). Thus, improper admission of evidence is not prejudicial and constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Kuhlman's photograph was of "minor significance" in reference to the "overall, overwhelming evidence" submitted to the jury during the three-day trial. *See Bourgeois*, 133 Wn.2d at 403. David has not shown that this photo materially affected the jury's verdict.

We hold, therefore, that error, if any, was harmless.

B. Exclusion of Victim's Toxicology Report

David next contends that the trial court erred in excluding from evidence, on relevancy grounds, the toxicology report showing that Kuhlman's body had tested positive for several drugs at the time of the accident. David argues that Kuhlman's toxicology report was relevant for three reasons: (1) to allow the jurors to consider all facts and circumstances material to whether he proximately caused Kuhlman's death, (2) to show that Kuhlman was the "sole proximate cause" of her own death, and (3) to show that Kuhlman's acts were an intervening, superseding cause that relieved David of liability.

The trial court excluded Kuhlman's toxicology report because the reason for her manner of driving was not relevant. Noting the inadequacy of David's offer of proof, however, we uphold the trial court's exclusion of evidence on this alternate ground. *State v. Michielli*, 132 Wn.2d 229, 242-43, 937 P.2d 587 (1997) (holding that an appellate court may affirm a trial court on any ground supported by the record).

David did not accompany his offer of the victim's toxicology report with an offer of expert testimony to show how the presence of the substances found in her body might have affected her driving. Admitting the report without such interpretive testimony would not have tended to prove what David was purporting to prove, namely that Kuhlman's driving caused the accident, thereby absolving him from criminal culpability.

Kuhlman's toxicology report did not tend to show that Kuhlman was the "sole proximate cause" of her death. On the contrary, the record clearly shows that David was intoxicated, he drove 25 m.p.h. above the posted speed limit, and he failed to activate his brakes before colliding with Kuhlman's vehicle. Nor did Kuhlman's toxicology report tend to show that she was an "intervening, superseding cause" because, if her intoxication had affected the collision, it would have contributed to her driving *before* David ran into her car and killed her.

Moreover, even without the toxicology report, the jury heard testimony that Kuhlman had been driving unusually slowly as she turned left across the highway when David struck her. Furthermore, the jury found that David was both intoxicated and driving recklessly, making him at least a concurrent proximate cause of Kuhlman's death. In light of these latter two factors, David fails to show that the trial court's exclusion of Kuhlman's toxicology report affected the trial's outcome.

We hold, therefore, that (1) the trial court did not abuse its discretion in excluding the victim's toxicology report, especially in light of the trial court's allowing other evidence showing that Kuhlman was driving in a strange manner when David collided with her; and (2) even if the trial court's ruling were an abuse of discretion, any error was harmless.

III. Jury Instructions

David assigns error to the jury instructions on two grounds. First, he argues that the jury instructions on proximate causation relieved the State of its burden to prove the absence of a superseding intervening cause. Second, he argues that the trial court did not adequately instruct the jury that it was required to find that David's blood test was valid. These arguments fail.

A. Standard of Review

Generally, we review a trial court's choice of jury instructions for abuse of discretion. *State v. Douglas*, 128 Wn. App. 555, 561-62, 116 P.3d 1012 (2005). But we review de novo jury instructions challenged on an issue of law. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds*, *State v. Berlin*, 133 Wn.2d 541 (1997).

It is prejudicial error to submit an issue to the jury that is not warranted by the evidence. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). Jury instructions are sufficient if they (1) correctly state the law, (2) are not misleading, and (3) permit counsel to argue his or her theory of the case. *State v. Mark*, 94 Wn.2d 520, 526, 618 P.2d 73 (1980). The jury instructions read as a whole must make the relevant legal standards manifestly apparent to the average juror. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997).

B. Proximate Cause

Here, the trial court's proximate cause instructions adequately informed the jury. Instruction No. 3 stated: "The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt." Supp. CP at 29. Instruction No. 7 again outlined that the jury must find each element of the crime beyond a reasonable doubt, including "[t]hat the defendant's driving proximately caused injury to another person." Supp. CP at 33.

The trial court also gave David's two proposed instructions defining proximate causation.

> To constitute vehicular homicide, there must be a causal connection between the death of a human being and the criminal conduct of a defendant so that the act done was a proximate cause of the resulting death.
>
> The term "proximate cause" means a cause which, in a direct sequence, unbroken by any new independent cause, produces the death, and without which the death would not have happened.
>
> There may be more than one proximate cause of a death.

Supp. CP at 38 (Instruction No. 12).

> If you are satisfied beyond a reasonable doubt that the acts of the defendant were a proximate cause of the death of the deceased, it is not a defense that the conduct of the deceased may also have been a proximate cause of the death.
>
> If a proximate cause of the death was a later independent intervening act of the deceased which the defendant, in the exercise of ordinary care, could not reasonably have anticipated as likely to happen, the defendant's acts are superseded by the intervening cause and are not a proximate cause of the death.
>
> However, if in the exercise of ordinary care, the defendant should reasonably have anticipated the intervening cause, that cause does not supersede defendant's original acts and defendant's acts are a proximate cause. It is not necessary that the sequence of events or the particular injury be foreseeable. It is only necessary that the death fall within the general field of danger which the defendant should have reasonably anticipated.

Supp. CP at 39 (Instruction No. 13).

These instructions explained the State's burden of proof as follows: (1) The State must prove, beyond a reasonable doubt, every element of the offense; (2) proximate causation is an element of vehicular homicide; and (3) proximate causation does not exist if a later independent intervening act that could not have been reasonably anticipated caused the victim's death. These instructions plainly and correctly stated the law, were not misleading, and permitted David to argue his theory that he did not proximately cause Kuhlman's death. *See Mark*, 94 Wn.2d at 526.

We hold that the trial court did not err when it instructed the jury on proximate cause.

C. Driving While Under the Influence

At the end of trial, David proposed a jury instruction on intoxication that read:

> To be considered valid an analysis of a person's blood must have been performed according to methods approved by the state toxicologist.
>
> In evaluating any evidence of blood testing, you shall take into account the manner in which any test was conducted, including the handling of any samples prior to testing as well as whether there was compliance with the procedures set by the state toxicologist.

Supp. CP at 45. The trial court declined to give this instruction because it related "more to the admissibility of the evidence rather than the weight." RP 4/14/05 at 11-12. David argues that the trial court erred. We disagree with David and agree with the trial court.

David's proposed jury instruction was redundant and unnecessary. The trial court did instructed the jury that, in order to convict, it must find, beyond a reasonable doubt that David was either reckless or that he "operated the motor vehicle . . . while under the influence of intoxicating liquor." CP at 33 (Jury Instruction No. 7). The trial court further instructed the jury that "under the influence of intoxicating liquor" means that defendant "drives a motor vehicle while he is under the influence of or affected by intoxicating liquor, or while he has sufficient alcohol in his body to have an alcohol concentration of 0.08 or higher within two hours after driving." CP at 34 (Jury Instruction No. 8).

These instructions were sufficient, correctly stated the law,[15] were not misleading, and permitted David to argue his theory of the case, namely that his blood test was faulty and that the jury should not believe the results. During trial, for example, David hotly contested the

[15] *See* RCW 46.61.502 (defining "driving under the influence).

procedures used to obtain his blood alcohol content. Moreover, the jury heard other evidence of David's intoxication from a witness and the state trooper, who both testified that David smelled strongly of alcohol after the crash.

Accordingly, we hold that the trial court did not abuse its discretion in declining to give David's proposed instruction on how the jury should evaluate his blood alcohol test.

IV. Prosecutorial Misconduct

David further argues that we should reverse his conviction because the prosecutor committed misconduct during her closing arguments. The State responds that David both mischaracterizes the facts and fails to meet his high burden of proof. We agree with the State.

On appeal, a criminal defendant demonstrates prosecutorial misconduct only if he shows that the prosecutor's conduct was both improper and prejudicial in the context of the whole trial. *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003), *review denied*, 151 Wn.2d 1039 (2004). If the defendant failed to object to prosecutorial misconduct during his trial, we will reverse only if the misconduct was so flagrant and ill-intentioned that a curative instruction would not have corrected the error. *State v. Jones*, 117 Wn. App. 89, 90-91, 68 P.3d 1153 (2003). David does not meet this high burden.

David points to two alleged errors during the State's closing argument, neither of which he objected to at trial. First, the prosecutor told the jury that her only motivation was "to [e]nsure that justice is done. I don't have any other [u]lterior motive." Second, she argued, "I submit the true theory of the case, it's exactly what happened." RP 4/14/05 at 65. David interprets these statements as the prosecutor's (1) attempt to draw a "cloak of righteousness" around her, and (2)

opining about David's guilt. David's interpretation is not persuasive.

First, David did not object to the prosecutor's statements at trial. Second, he fails to demonstrate on appeal that they were "flagrant and ill intentioned" or that "a curative instruction could not have obviated the resulting prejudice." *See Jones*, 117 Wn. App. at 90-91 (citing *State v. Suarez-Bravo*, 72 Wn. App. 359, 367, 864 P.2d 426 (1994)).

Accordingly, we hold that David has not shown prosecutorial misconduct.

V. Exceptional Sentence

David also challenges his sentence. He argues that the trial court imposed an exceptional sentence based on his intoxication without submitting this factual question to the jury, in violation of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). David's argument fails because, contrary to his assertion, the jury did find that he drove under the influence of alcohol.

In *Blakely*, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Blakely*, 124 S. Ct. at 2536 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 2362-63, 147 L. Ed. 2d 435 (2000)). Our Legislature has provided that a person found guilty of vehicular homicide statute while driving under the influence of alcohol is subject to a two-year sentencing enhancement for each of his prior alcohol violations.[16] RCW 46.61.520(2); *and see* RCW 46.51.5055 (defining alcohol violations).

[16] David had four prior alcohol violations for DUI.

David argues that the trial court erred, under *Blakely*, when it imposed the sentencing enhancement for his prior DUIs because the jury did not decide whether he had been driving under the influence of alcohol. David's assertion is incorrect. The jury did decide that he drove under the influence of alcohol when it answered, "Yes," to an interrogatory on the special verdict form asking whether "the jury found unanimously that at the time of causing the injury, the defendant was operating the motor vehicle . . . [w]hile under the influence of intoxicating liquor?" Supp. CP at 23. Moreover, as we previously discussed, the trial court properly instructed the jury on their duty to determine whether David had been under the influence of intoxicating liquor. We hold, therefore, the trial court court's reliance on the jury's finding of fact that David drove while intoxicated did not violate *Blakely*.

David further argues that (1) the United States Supreme Court wrongly decided *Almendarez-Torres v. United States*,[17] which underlies the "prior convictions" *Blakely* exception; and (2) therefore, we should require that a jury determine whether a criminal defendant has prior convictions. We have no authority to overrule the United States Supreme Court. Therefore, *Blakely's* "prior conviction" exception remains binding law, *see Blakely*, 124 S. Ct. at 2536, and David's argument fails.

VI. Statement Of Additional Grounds

In his Statement of Additional Grounds for Review[18] (SAG), David raises three additional issues: (1) the trial court violated his right to a speedy trial; (2) "the DUI enhancement statute of

[17] 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998).

[18] RAP 10.10.

R.C.W. 9.94.A.533(7) violates the ex po[st] facto of the United States and the Washington State Constitution"; and (3) his trial counsel did not allow two eye-witnesses or the State's crash specialist to testify. These three arguments also fail.

A. Speedy Trial

David argues that the trial court violated his right to a speedy trial because "the trial was set back 8 times and [was] bounced back and fourth [sic] between two judg[es] under the same cause number," even though he "had not waved [sic] his speedy trial right[]." SAG at 2. Because David has not certified on appeal the relevant portion of the record, this argument fails.

A party seeking review bears the burden to perfect the record so that the reviewing court has before it all the evidence relevant to the issues raised on appeal. RAP 9.1-9.7; *State v. Vazquez*, 66 Wn. App. 573, 583, 832 P.2d 883 (1992). Where the record is inadequate for review of an issue, we will not reach the issue on direct appeal. *See* RAP 10.10(c) (stating that an appellate court is not obligated to search the record in support of claims made in a defendant's SAG); *State v. Wheaton*, 121 Wn.2d 347, 365, 850 P.2d 507 (1993). The record before us does not contain the relevant motions to continue trial, any waivers of CrR 3.3, or any trial court rulings on this issue. Therefore, we are unable to review this issue on direct appeal.[19]

B. Ex Post Facto Legislation

David also contends that RCW 9.94A.533(7) violates the constitutional ban on ex post facto legislation.[20] SAG at 1-2. More specifically, he argues that the trial court erred by using his

[19] "[A] personal restraint petition is the appropriate means of having the reviewing court consider matters outside the record." *State v. McFarland*, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995).

four prior driving under the influence (DUI) convictions that were more than ten years old to enhance his vehicular homicide sentence. This argument also fails.

A law violates the ex post facto clause of the Constitution if it (1) criminally punishes an act that was not a crime at the time it was committed, (2) makes the punishment for a crime more burdensome after its commission, or (3) deprives an accused of a defense previously available under the law in effect at the time the accused committed the alleged crime. *State v. Ward*, 123 Wn.2d 488, 497, 869 P.2d 1062 (1994) (citing *Collins v. Youngblood*, 497 U.S. 37, 42-43, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990)).

None of these three ex post facto indicia, however, are present here. For each of David's prior RCW 46.61.5055 ("Alcohol Violators") convictions, RCW 9.94A.533(7) added two years to his standard sentencing range for vehicular homicide committed while under the influence of alcohol.[21] This alcohol-related sentence enhancement became effective on January 1, 1999. *See* Laws of 1998 ch. 211, §§ 3, 7.[22] David was driving recklessly while intoxicated when his vehicle struck Kuhlman's vehicle, killing her, on August 6, 2004, more than five years after this statutory sentencing enhancement's effective date. And as of August 6, 2004, David had accumulated four prior convictions for offenses listed in RCW 46.61.5055.

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[20] U.S. Const. art. I, § 10, cl. 1; Wash. Const. art. I, § 23.

[21] Vehicular homicide has been a crime in Washington since at least 1937. *See* Laws of 1937, ch. 189, §§ 120, 159. This crime is now codified at RCW 46.61.520.

[22] The statutory enhancement for vehicular homicides committed by persons driving while intoxicated, with prior DUI-related convictions, was originally located at RCW 9.94A.510(7). See RCW 9.94A.510 (2002). The enhancement has since been re-enacted verbatim and recodified as RCW 9.94A.533(7). *See* Laws of 2002 ch. 290, §§ 11, 31.

Thus, David was not punished for conduct that was innocent at the time; nor did the Legislature make his punishment more burdensome after he committed the crime of vehicular homicide.[23] *See Ward*, 123 Wn.2d at 497. Consequently, the statutory vehicular homicide enhancement did not violate the ex post facto clause of the Constitution as applied to David.

C. Effective Assistance of Counsel

David further asserts that he received ineffective assistance of counsel because his trial attorney did not call three witnesses to testify: Cynthia Meline, Larry Stigall, and the State's crash specialist. SAG at 1. David argues that all three witnesses would have bolstered his argument that Kuhlman violated his right of way. SAG at 1. Again, we disagree.

Generally, a decision to call or not to call a witness is a matter of legitimate trial tactics and will not support a claim of ineffective assistance of counsel. *State v. Hayes*, 81 Wn. App. 425, 442-43, 914 P.2d 788, *review denied*, 130 Wn.2d 1013 (1996). "The failure to call the witnesses must have been unreasonable and must result in prejudice, or create a reasonable probability that, had the lawyer presented the witnesses, the outcome of the trial would be different." *State v. Sherwood*, 71 Wn. App. 481, 484, 860 P.2d 407 (1993), *review denied*, 123 Wn.2d 1022 (1994).

Here, the jury heard testimony that Kuhlman drove exceptionally slowly as she turned left across David's lane of travel. And the trial court instructed the jury that Kuhlman had a duty to yield to oncoming traffic. Thus, testimony from these three other witnesses would have been cumulative and unnecessary to prove facts already in evidence for the jury's consideration.

[23] Nor did it increase his punishment for any of his prior DUI convictions.

We hold, therefore, that because David has failed to show that his trial counsel's decision not to call these three witnesses affected the trial's outcome, his ineffective assistance of counsel argument fails.

Affirmed.

Hunt, J.

We concur:

Armstrong, J.

Van Deren, A.C.J.